199

SUPREME COURT OF THE UNITED STATES.

No. ~~229.~~ 110.

SMYTH CLARK AND AL., PLAINTIFFS IN ERROR,

vs.

MARK SHELDON, W. H. GRAVES, AND O. F. GRIFFIN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEVADA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 229.

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INDEX.

	Original.	Print.
Clerk's certificate	1*a*	1
Complaint	1	1
Summons	3	3
Answer	6	4
Replication	13	8
Demurrer	17	11
Judgment	18	11
Minutes of district court	20	12
Notice of appeal	35	21
Appeal bond	36	21
Certificate of clerk of district court	38	23
Judgment	39	23
Copy of writ of error	41	24
Assignment of error	45	27
Bond	48	28
Citation and service	51	30

UNITED STATES OF AMERICA,
Territory of Nevada, ss:

I, J. McC. Reardan, clerk of the supreme court of the Territory of Nevada, do hereby certify that the following is a true and correct copy of the transcript from the district court of the 1st judicial district, in and for Storey county, Territory aforesaid, in the case of Mark Sheldon et als. *vs.* Smyth Clark et als.; and also of the judgment of our said supreme court therein, and of affidavit of amount, writ of error, petition for citation, assignment of error, bond on writ of error and citation, as the same remain of record and on file in my office.

In witness, I have hereunto set my hand and affixed the seal of said supreme court, at Carson city, the capital of said Territory, this 31st day of October, A. D. 1862.

[SEAL]

J. McC. REARDAN, *Clerk.*

District Court, 1st Judicial District, Territory of Nevada, County of Storey.

MARK SHELDON, W. H. GRAVES, and O. F. GRIFFIN, partners, doing business under the name and style of Empire Mill and Mining Company, Plaintiffs,

vs.

SMYTH CLARK, CHARLES GIBSON, A. F. MEYERS, R. W. Myers, Samuel Spiro, John Williams, J. B. Beers, F. H. Kirby, W. H. Young, F. W. Steele, W. L. Steele, I. W. Ward, J. W. Hastings, I. S. Bump, Erastus Bond, George Moyle, Daniel Schely, Charles Hart, W. M. Edwards, Jos. Shaw, R. Griffith, H. C. Millington, S. A. Morrison, Wm. B. Hickok, John McIsaac, Morris Spiro, Jno. Cassidy, George Goard, M. T. Thompson, Jas. Durant, John Kelly, A. Phillipson, J. Lambert, members of and composing the Sacramento Mining Company, Defendants.

The above named plaintiffs, partners, doing business under the name and style of the Empire Mill and Mining Company, complain of the above named def'ts, members of and composing the Sacramento Mining Company, of said county, and complaining, show: That heretofore, to wit, on or about the 2d day of November, A. D. 1861, at said county, the said def'ts, members of and composing said Sacramento Mining Company, were indebted to the said plaintiffs, partners, as aforesaid, in the sum of eight thousand three hundred and $\frac{50}{100}$ dollars, for working and reducing 278 tons 709 pounds of quartz rock and ore for said defendants composing said company, at the agreed sum and price, per ton, of thirty dollars, for each and

every ton thereof in the quartz mill and works of the said
2 plaintiffs, partners as aforesaid, from and between the 26th day of September, 1861, and the said 2d day of November, 1861, and said defendants composing said company, in consideration of said indebtedness, then and there undertook and faithfully promised to pay said plaintiffs said sum of money whenever thereunto after requested.

Said plaintiffs say that said defendants, composing said company, from and between the 28th day of September, 1861, and the 2d day of November, 1861, paid to said plaintiffs, on account of said indebtedness, the sum of $4,555 27-100, leaving a balance due and unpaid of the sum of $3,795 23-100.

Plaintiffs further say, that said defendants, composing said company, although often requested thereto, have hitherto wholly neglected and refused, and do still neglect and refuse to pay said sum of money, so due as aforesaid, or any part thereof, and the whole of said sum of $3,795 23-100 still remains wholly unpaid, due and owing from said defendants, composing said company, to said plaintiffs.

Wherefore the said plaintiffs demand judgment against the said defendants, members of and composing said Sacramento Mining Company, for the sum of three thousand seven hundred and ninety-five $\frac{23}{100}$ dollars, with legal interest thereon, and costs of suit, &c.

STEWART, KIRKPATRICK & RISING,
Att'ys for Pl'ffs.

TERRITORY OF NEVADA,
County of Storey.

W. H. Graves, one of said plaintiffs, being duly sworn, deposes and says that he has heard read the foregoing complaint, and
3 knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters, he believes it to be true.

W. H. GRAVES.

Subscribed and sworn to before me this 29th day of January, 1862.

D. M. HANSON,
Clerk 1st Dist. Court.

Endorsement: 1st district court, Sacramento co. Mark Sheldon *et als. vs.* Smyth Clark *et als.* Complaint filed in my office, at Va. city, this January 29th, 1862, at 12¼ o'clock, p. m. D. M. Hanson, clerk. Steuart, Krikpatrick & Rising, attorneys for plaintiffs.

Summons.

TERRITORY OF NEVADA,
County of Storey.

In the district court of the first judicial district.

The people of the United States of America, in the Territory of Nevada, send to Smyth Clark, Chas. Gibson, A. F. Meyers, R. W. Meyers, Saml. Spiro, John Williams. J. B. Beers, T. H. Kirby, W. H. Young, T. W Steele, W. L. Steele, J. W. Ward, J. W. Hastings, J. S. Bump, E. Bond, G. W. Moile, David Sheley, Chas. Heart, Wm. M. Edwards, Jos. Shaw, R. Griffiths, H. C. Millington, S. A. Morrison, W. B. Hickok, Jno. McIsaac, Morris Spiro, Jno. Cassidy, Geo. Goard, W. T. Thompson, Jos. Durant, John Kelly, A. Phillip-
4 son, J. Lambert, members of and composing Sacramento Mining Company, greeting :

You are hereby required to appear in an action commenced against you, as defendants, by Mark Sheldon, W. H. Graves, and O. F. Giffin, partners, doing business under the name and style of Empire Mill and Mining Company, as plaintiffs, in the district court of the 1st judicial district in and for the county of Storey, Territory of Nevada, at Virginia city, and answer the complaint therein, which is on file with the clerk of said court, within ten days after the service upon you of this summons (exclusive of the day of service) if served in said county, or twenty days if served out of said county, but within said district, and in all other cases forty days, or judgment by default will be taken against you, according to the prayer of the said complaint. The said action is brought to recover the sum of three thousand seven hundred and ninety-five and $\frac{23}{100}$ dollars ($3,795 23,) being balance due for working, crushing, and reducing 278 tons 700 pounds of quartz rock and ore for said defendants, composing said Sacramento Mining Company, between the 26th day of September, A. D. 1861, and the 2d day of November, 1861, at the agreed sum and price of thirty dollars per ton therefor, at the quartz mill and works of said plaintiffs, in said county, with legal interest, and cost of suit, &c.

And you are further notified, that if you fail to appear and answer the said complaint, the said pl'ffs will take judgment for the said sum of $3,795 $\frac{23}{100}$, and interest, besides costs.

In testimony whereof, I, David M. Hanson, have hereunto set my hand. and affixed the seal of said court, this 29th day of January, A. D. 1862.

DAVID M. HANSON,
Clerk of the 1st Dist. Court, Nevada Territory.

5 *Sheriff's return on summons.*

TERRITORY OF NEVADA,
County of Storey, ss :

I hereby certify, that I received the annexed summons on the

29th day of January, 1862, at 1 h. 55 m. p. m., and that on the 30th day of January, 1862. I personally served the same, at Storey county, upon each of the following named, to wit: Smyth Clark, A. F. Myers, Saml. Spiro, John Williams, T. H. Kirby, W. H. Young, T. W. Steele, H. C. Millington, John McIsaac, Jno. Cassidy, W. T. Thompson, John Kelly, W. L. Steele, J. W. Ward, J. W. Hastings, E. Bond, Wm. M. Edwards, and A. Phillipson, by delivering to each one of them in person a true copy of said summons; and I further certify that, on the said 30th day of January, A. D. 1862, I served the said summons upon M. Spiro, by delivering to his agent, S. Spiro, in person, a true copy thereof; and I also further certify, that on the 31st day of January, A. D. 1862, I also served the said summons, at Storey county, upon each of the following named defendants, to wit: Charles Gibson and Joseph Durant, by delivering to each of them in person a true copy of the same; and I further certify, that on the 1st day of February, A. D. 1862, I also served the said summons, at Storey county, upon R. Griffith, one of the def'ts named therein, by delivering to him personally a true copy thereof; and I further certify, that the following named defendants, after due and diligent search, could not be found by me in my county, to wit: J. B. Biers, S. A. Morrison, J. Lambert, J. S. Bump, G. W. Moyle, Daniel Schley, Chas. Heart, Jos. Shaw, W. B. Hickok, George Goard, R. W. Meyers, Virginia City, Storey county, February 4th, 1862.

W. H. HOWARD,
Sheriff of Storey County, N. T.

In the district court, 1st judicial district, in Storey county, in the Territory of Nevada, United States of America.

MARK SHELDON, W. H. GRAVES, and O. F. GRIFFIN, copartners doing business under the firm name of The Empire City Mill and Mining Co., Plaintiffs,
against
SMYTH CLARK, CHARLES GIBSON, A. F. MEYERS, H. C. MILLINGTON and others, Defendants.

And now comes Henry C. Millington by Hiram C. Clark, his attorney, and makes his separate answer for himself to the allegations on complaint alleged against him. For answer to the complaint this defendant denies that he made any contract with pl'ffs, as alleged in the complaint in this action. Defendant denies also all and singular the allegations and charges in the complaint, contained and exhibited against him, and he prays that pl'ffs be held to strict proof of the same.

For further answer, defendant alleges that he is informed and believes true, and therefore states, that plaintiffs undertook to crush and reduce certain ores procured (as mentioned in the complaint) from the ledge of gold and silver ore known as the Sacramento ledge,

as set forth in their complaint; but that the same was done in an unworkmanlike and unskilful manner, and was negligently done, to the great injury of this defendant, by which defendant suffered an injury greater than any amount or sum of money the pl'ffs can demand, or have any right to claim or recover from him.

Dated Feb. 10th, 1862.

HIRAM C. CLARK,
Attorney for Defendant.

HENRY C. MILLINGTON.

7 TERRITORY OF NEVADA
County of Storey, ss:

Henry C. Millington, one of the said defendants, being duly sworn, deposes and says that he has heard read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

H. C. MILLINGTON.

Subscribed and sworn to this 10th day of February, A. D. 1862, before me.

WM. HUTCHINS,
Notary Public for Storey County.

Endorsement on answer: In district court, 1st judicial district, N. T. Mark Sheldon and others against Smyth Clark, Henry Millington and other. Answer. Filed Feb. 10th, 1862. D. M. Hanson, cl'rk, by Chas. Ranson, deputy. Hiram C. Clark, att'y for def't Millington.

Answer of W. F. Myers.

In the district court, 1st judicial district, county of Storey, Territory of Nevada.

MARK SHELDON, W. H. GRAVES, and O. F. GRIFFEN partners, &c., under the name and style of Empire Mill and Mining Co., Plaintiffs,
vs.
SMYTH CLARK, CHARLES GIBSON, and W. F. MYERS *et als.*, members of and composing the Sacramento Mining Company.

And now comes W. F. Myers, president of the Sacramento Company, the defendants in the above entitled action, and answer-
8 ing for himself and his co-defendants, except his co-defendant, H. C. Millington, and for answer says: That he denies

that heretofore, to wit, on or about the 2d day of November, A. D. 1862, or at any other time before or since the commencement of this suit, that these defendants, composing the said Sacramento Company, were indebted to the plaintiffs herein, in the sum of eight thousand three hundred and fifty 50-100 dollars, or in any other sum or sums, for working, crushing, and reducing 278 tons 709 pounds, or any other number of tons or pounds of quartz rock and ore for the defendants herein, at the agreed price of thirty dollars per ton for each and every ton thereof, in the quartz mill and works of the plaintiff's herein, between the 26th day of September, 1861, and the said 2d day of November, 1861, or between any other days before or since the commencement of this suit, as is alleged in plaintiff's complaint; and the defendant, further answering for himself and his co-defendants, denies that in consideration of said indebtedness, or any other indebtedness, they then and there undertook and faithfully promised to pay said plaintiffs said sum of money, or any other sum or sums, whenever thereunto after requested, as is alleged in plaintiff's complaint; and this defendant, further answering for himself and his co-defendants as aforesaid, denies that there is a balance due the pl'ff's, and unpaid, of the sum or sums, and that the same still remains wholly unpaid, due, and owing from these defendants to said plaintiffs, as is alleged in plaintiff's complaint; and these defendants, further answering, say, and ever that in the month of September, 1861, these defendants, the Sacramento Company, were having their quartz rock from their claim crushed, reduced and amalga-
9 mated at other than the pl'ff's mill, and at the price of twenty dollars per ton, when the Empire Mill Company, then composed of the plaintiffs in this action, together with one H. G. Blaisdell, approached the defendants, the Sacramento Company, and solicited the quartz rock of the defendants to crush, and represented to these def'ts that they had a superior mill, and complete and thorough amalgamator, and a superior process for working, reducing and amalgamating gold and silver ores, by which the yield from said ores of gold and silver would be increased, and that for that reason their process was of more and greater value than the process in use at the mills where these defendants were then having their quartz rock reduced, and that their process was worth the sum of thirty dollars per ton for crushing, reducing and amalgamating; and these defendants, induced by and relying on the aforesaid representations and statements of said persons aforesaid, then composing the said Empire Mill Company, and relying on the integrity and good faith of said Empire Mill Company, then and there agreed to deliver the said Empire Mill Company forty tons of their first class quartz rock for crushing, reducing and amalgamating, and to pay them for the same the sum of thirty dollars per ton, and that they did so deliver the same, and the same was crushed, reduced and amalgamated by said Empire Mill Company, and that the said quartz rock so delivered, crushed, reduced, and amalgamated as aforesaid, yielded, as returned by said Empire Mill Company, to these defendants, the sum

of $68 12½-100 per ton, and that then the said H. G. Blaisdell ceased to be a member of the said Empire Mill Company; and these defendants say, that the price agreed upon to be paid by them to said
10 Empire Mill Company as aforesaid, for crushing, &c., of their said forty tons of rock, was by them then and there fully paid and satisfied by paying to said Empire Mill Company the sum of twelve hundred and twelve dollars; and these defendants say, that they soon afterwards, relying on the said yield of their said quartz rock, and the representations and statements of the pl'ffs, as to the perfection of their process in their said mill in crushing, reducing and amalgamating, and the honesty, integrity, care and diligence of said plaintiffs in the conducting of their mill and works, proceeded to deliver to said plaintiffs, for the purpose of having the same crushed, reduced and amalgamated, two hundred and thirty-six tons of the like quality of first class quartz rock, as the forty tons aforesaid crushed by the Empire Mill Company, and that the same, and no more, was crushed, reduced and amalgamated by said plaintiffs, and should and would have produced the like yield per ton of sixty-eight 12½-100 dollars, as was the produce and yield of the forty tons aforesaid, crushed by the Empire Mill Company, had the said plaintiffs crushed, reduced and amalgated the same with care, prudence, diligence and skill, and in a good and workmanlike manner, as they were bound to do. And these defendants say that said plaintiffs knowingly, wilfully, and wrongfully crushed, reduced and amalgamated said two hundred and thirty-six tons of quartz rock aforesaid negligently, without care, prudence or diligence, and in an unskilful and unworkmanlike manner, whereby the two hundred and thirty-six tons of the said first class rock only yielded and produced, as these defendants have been informed, and they believe said information to be true and so say, and aver the gross sum of
11 twenty-two dollars per ton and these defendants say; that by reason of the said negligence, carelessness, want of diligence, and unskilful and unworkmanlike conduct of said plaintiffs, they have suffered great loss, damage and injury, and to the full sum of thirty-eight dollars on each and every ton of the said two hundred and thirty-six, tons of defendants' quartz rock, over and above the demand of plaintiffs of thirty dollars per ton for crushing of the same, amounting to the full sum of eight thousand nine hundred and sixty-eight dollars, exclusive of any compensation to pl'ffs for the crushing, &c., of the same. And these defendants say that said plaintiffs have taken the proceeds and yield of a large portion of the said quartz rock, the exact amount of said portion being to these defendants unknown, and in their own name and for their own account have sent the same to San Francisco; and these defendants do not know of the true sum of the portion so forwarded, and that the said portion is now in the custody of the plaintiffs or their agents in the said city of San Francisco, in the State of California, and is and remains unaccounted for; and these defendants say that they have received from said plaintiffs of the produce and yield of said 236 tons

of quartz rock aforesaid, the sum of $\$1,226\frac{26}{100}$, and that by reason of the aforesaid acts, negligence and unskilful and unworkmanlike conduct of said plaintiffs, they, the said plaintiffs, became and were and now are liable to pay to these def'ts the full sum of $8,968 aforesaid, and that these def'ts have received from said plaintiffs of the yield nnd produce of said 236 tons of quartz rock aforesaid the sum of $\$1,226\frac{26}{100}$ aforesaid, and that there is now due and payable from
12 said pl'ffs to these def'ts the full sum of $7,741\frac{74}{100}$, for which sum these def'ts say they are entitled to judgment against said pl'ffs. Wherefore these defendants demand judgment against said plaintiffs for the said sum of seven thousand seven hundred and forty-one $\frac{74}{100}$ dollars, with legal interest on the same, and for their costs in this behalf expended, and that they may have execution therefor.

PLATT & DAVENPORT,
Att'ys for Defendants.

TERRITORY OF NEVADA,
County of Storey.

W. F. Meyers, being first duly sworn, deposes and says, that he is the president of the Sacramento Company, the defendants in the foregoing cause; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

W. F. MEYERS.

Sworn to before me this 9th day of February, 1862.

J. W. NOYES,
Justice of the Peace, Virginia City precinct.

Endorsement: First judicial district. Empire Mill Company *vs.* Sacramento Mining Company. Answer: Filed in my office at V'a City this February 11, 1862. D. M. Hanson, clerk. Attorneys for defendants, Platt and Davenport.

13 *Replication.*

District court, 1st judicial district, Territory of Nevada, county of Storey.

MARK SHELDON *et als.*,
vs.
SMYTH CLARK *et als*

Now come the plaintiffs, and for reply to the new matter set up in the answer of W. F. Myers and the defendants, the Sacramento Company, say, that as to the said defendants working other quartz rock at other mills for the price per ton of twenty dollars, these plaintiffs have no knowledge or information thereof; these plaintiffs, further re-

plying, deny that the 236 tons of quartz rock and ore, or any part or quantity thereof, was of the like quality of first class quartz rock as the said forty tons, or that said 236 tons was all that was crushed and reduced, or that the same, or any part thereof, should have or would have produced the like yield, per ton, of $68 $\frac{12}{100}$, or any other sum of money, except as hereinafter stated, had the plaintiffs crushed, reduced, or amalgamated the same with care, prudence, diligence, and skill, and in a good and workmanlike manner. And said plaintiffs say, the 40 tons of quartz rock and ore crushed, reduced, and amalgamated by them for said defendants was well picked, and selected with great care and particularity by the said defendants, and was of the best quality rock which the defendants could procure. That the 236 tons of quartz rock and ore crushed, reduced, and amalgamated by said plaintiffs was not selected at all, was taken from the ledge without any care or regard for the
14 quality of the same, or any part of it, and was poor and inferior quartz rock, and was hurried down to the quartz mill of said plaintiffs. That the said plaintiffs observed the character of said quartz rock and ore, and informed the agents of said defendants, and the said defendants told them that they did not think that such rock could pay even the expenses of the same, and desired the said defendants to select the rock with care, and send such rock as the said 40 tons. That the said defendants did not heed or pay any attention to the information and desire aforesaid, but sent to said mill poor, inferior quartz rock to be crushed. Plff's further replying, deny that they knowingly, wilfully, or unlawfully crushed, reduced, or amalgamated 236 tons of quartz rock, or any part thereof, or any other quantity of quartz rock, negligently, without care, prudence, or diligence, or in an unskilful or unworkmanlike manner, whereby 236 tons of said quartz rock, or any part thereof, only yielded or produced the sum of twenty-two dollars per ton. Plaintiffs say that they worked, reduced, and amalgamated said quartz rock and ore with the same care, prudence, skill, and attention that they worked and amalgamated said 40 tons of rock, but that the same was of a poor and inferior quality and class of rock, and that they extracted from the same all that was possible to extract and obtain from the same, and accounted therefor to said defendants. Plaintiffs deny, that by reason of any negligence, carelessness, want of diligence, or unskilful or unworkmanlike conduct, or otherwise, said def'ts have suffered great or any loss, damage, or injury, or to the full sum of $38 00, or any other sum of money, whatever, on each, every, or any ton of
15 236 tons of quartz rock, or any part thereof. over or above the sum of $30 $\frac{00}{100}$ per ton for crushing, amounting to the full sum of $8,968 $\frac{00}{100}$, or any part thereof, or any other sum of money, whatever. Said plaintiffs say, that all that the said 236 tons of quartz rock paid and yielded was the true sum of about twenty-two dollars per ton. Plaintiffs deny that they have taken the proceeds or yields of any value or any part thereof, except what they have accounted to defendants for, of a large portion, or any portion whatever, of said

quartz rock, of any amount or value whatever, or that they have sent the same, or any part thereof, to San Francisco, or other place. Pl'ffs deny that they have now or ever have had any portion of any of the proceeds or yields, of any value, in their custody, or the custody of their agents in San Francisco, or any other place, for which they have not accounted to said def'ts for. Pl'ffs deny, that by reason of their acts, negligence, or unskilful or unworkmanlike conduct, or otherwise, they ever became liable, or are now liable, to pay said defendants the full sum of $8,968 $\frac{00}{100}$, or any part thereof, or any sum of money whatever; and pl'ffs deny that there ever was, or is now, due or payable from them to said defendants, or either of them, the full sum of $7,741 $\frac{77}{100}$, or any part thereof, or any other sum of money whatever, or for which, or anything else, that defendants are entitled to judgment against plaintiffs for. Plaintiffs say that they have always strictly accounted to said defendants for any and all the proceeds and yields of all the quartz rock and ore which they ever crushed, reduced, and amalgamated for said defendants, and given the
16 true, correct, and honest results and returns therefrom. Plff's further replying, deny that they ever made any representations, or offered any inducements to said def'ts, for the object of obtaining or procuring their quartz rock to crush, reduce, or amalgamate, or ever represented that they had a superior process; but plaintiffs say, that they have a good process, and one by which they can work and amalgamate the precious metals closely, and well and profitably, with good quartz rock.

Wherefore plaintiffs pray judgment as they pay in their complaint, &c.

STEWART, KIRKPATRICK & RISING,
Attorneys for Pl'ffs.

TERRITORY OF NEVADA,
County of Storey, ss:

William Graves, one of said pl'ffs, being duly sworn, deposes and says that he has heard read the foregoing replication, and knows the contents thereof that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

W. H. GRAVES.

Subscribed and sworn to before me this 18th day of *of* February, 1862.

J. W. NOYES,
Justice of the Peace, Virginia City precinct.

Endorsement on replication: First district court. Mark Sheldon *et als. vs.* Smyth Clark *et als.* Replication filed in my office at Va. City, Feb. 18th, 1862. D. M. Hanson, clerk 1st dist. court, by Chas. Rauson, dp'y.

17 *Demurrer to replication.*

In the district court, 1st judicial dist., Storey co., N. T.

MARK SHELDON *et als.* *vs.* SMYTH CLARK *et als.* } Demurrer.

And now come the defendants and demur to the reply filed herein, for that it appears upon the face thereof that the same does not state facts sufficient to constitute a ground of reply.

That the denials in said reply are not responsive to the allegations of def'ts' answer, and particularly that denial in plaintiff's replication which refers to the proceeds and yields of quartz rock, which the defendants allege in their answer was sent to the agents of plaintiffs in San Francisco.

PLATT & DAVENPORT,
Att'ys for D'fts.

Endorsement on demurrer: District court, 1st judicial district, Storey county, N. T. Mark Sheldon *et als. vs.* Smyth Clark *et als.* Demurrer to replication. Filed Feb. 28th, 1862. D. M. Hanson, clerk, by Chas. Rauson, d'p'y. Platt & Davenport, attorneys for defendants.

18 *Judgment.*

1st district court, Storey county.

MARK SHELDON, O. F. GRIFFIN, and WM. H. GRAVES, partners doing business under the firm name of Empire Mill and Mining Company, Plaintiffs,
vs.
SMYTH CLARK, CHARLES GIBSON, W. F. MEYERS, R. W. MEYERS, Samuel Spiro, John Williams, J. B. Beers, T. H. Kirby, W. H. Young, J. W. Steel, W. L. Steele, J. W. Ward, J. W. Hastings, J. S. Bump, Erastus Bond, George W. Moyle, D. Shelly, Chas. Heart, W. M. Edwards, Jos. Shaw, Richard Griffiths, H. C. Millington, S. A. Morrison, W. B. Hickok, John McIsaacs, Morris Spiro, Jno. Cassidy, George Goard, Monroe Thompson, Jas. Durant, John Kelly, Adolph Phillipson and Joseph Lambert, members of and composing the Sacramento Mining Company, Defendants.

The above entitled cause came on regularly for trial upon the pleadings, and a jury of twelve having been regularly empanelled and sworn, and the testimony and proofs of the respective parties having been fully adduced, and the cause argued by counsel, and the jury instructed by the court, retired for deliberation; and the jury having afterwards returned into court and rendered a verdict for the

plaintiffs in the amount claimed by them: Wherefore, in consideration of the premises, the verdict and the law, it is hereby ordered by the court that the said plaintiffs have and recover judgment of, from and against the said defendants, members of and composing
19 the Sacramento Mining Company, for the sum of three thousand seven hundred and ninety-five $\frac{23}{100}$ dollars, ($3,795 $\frac{23}{100}$,) with legal interest thereon from the day of A. D. 186 , until paid, besides costs of suit, taxed, at $142.

It is further ordered that execution issue against the joint property of the defendants, members of and composing the Sacramento Mining Company, and against the separate and individual property of the defendants, Smyth Clark, Charles Gibson, W. F. Meyers, R. W. Meyers, Samuel Spiro, Morris Spiro, John Williams, J. B. Beers, T. H. Kirby, W. H. Young, J. W. Steel, W. L. Steel, J. W. Ward, J. W. Hastings, J. S. Bump, Erastus Bond, Geo. W. Moyle, David Sheley, Charles Heart, W. M. Edwards, Jos. Shaw, Richard Griffiths, H. C. Millington, S. A. Morrison, Wm. B. Hickok, John Mc. Isaacs, John Cassidy, Geo. Goard, Monroe Thompson, Jas. Durant, John Kelly, Adolph Phillipson and Joseph Lambert.

Done in open court, May 19th, A. D. 1862.

GORDON N. MOTT,
Dist. Judge, 1st district.

20 *Minutes of the district court.*

District court, 1st judicial district—May term, A. D. 1862.

SATURDAY, (twelfth day,) *May 17th.*

MARK SHELDON *et al.*
vs.
SACRAMENTO G. & S. M. Co.

This cause coming on regularly for trial this day, came the plaintiffs, by Messrs. Stewart, Kirkpatrick, and Rising; as also the defendants, by Messrs. Platt & Davenport. Whereupon the clerk, by order of the court, called from the list of jurors, the following, to wit: George H. Dana, W. H. Godfrey, Charles Coover, A. J. Gould, J. A. Newall, William Arrington, John Lent, J. Knox, J. D. Magher, John Brickell, Samuel Wattenberger, Hiram S. Falor, J. W. Sterritt, Benjamin Strickland, J. Hertnett, S. M. Collins, H. L. Conger, Walter Winn, Charles Jones, George Language, B. Darling, Edwin Cushing, and John S. Bates, who were by the clerk duly sworn on voir dire. Whereupon the plaintiffs, upon peremptory challenge, excused John Lent, J. Knox, J. W. Sterritt, and George Language; and the defendant, upon like challenge, excused W. H. Godfrey, Charles Coover, H. L. Conger, and Walter Winn. And now the respective parties having accepted the remaining jurors, to wit, George H. Dana, A. J. Gould, J. A. Newall, William Arrington, John Brickell, Samuel Wattenburger, Hiram S. Falor, J. Hertnett, S. M. Col-

lins, Charles Jones, B. Darling, and Edwin Cushing, they were duly sworn to well and truly try the matter in issue in said case.

Whereupon the statement of the case having been made to
21 the jury, there came, on the part of the plaintiffs, W. H. Graves and Robert M. Graves, who being duly sworn, testified. And now the plaintiffs, having closed their testimony, rested. Then came H. G. Blasdell, J. W. Farrington, Jas. S. Warren, Charles Baudman, James B. Raney, James J. Brown, John Dinsmore, Robert Hunter, Monroe Thompson, who being duly sworn, testified herein on the part of the defendants. Whereupon the plaintiffs, in rebuttal of the evidence of defendants, called Dr. Veach, Wm. Bevins, J. W. Hastings, who, under oath, testified herein. And now, the evidence of the plaintiffs and defendants having closed, the argument was made to the jury by Wm. M. Steuart, esq'r, for pl'ffs, and Alonzo Platt, esq'r, for defendants. And now the said jury having received the instructions of the court, retired to deliberate. And now came the jury last aforesaid, who were duly empanelled and sworn to try the matter in issue in the above-entitled cause, who being called, answered to their names; and being asked, by the court, if they had agreed upon a verdict, answered thereto in the affirmative, and presented the following, to wit:

We, the jurors in the case of Mark Sheldon and others *vs.* Smyth Clark and others, do find for pl'ffs, for amount claimed.

BARBER DARLING.
C. JONES.
S. M. COLLINS.
JEREMIAH HERTNETT.
J. S. NEWALL.
JOHN BRICKETT.
S. M. WATTENBURGER.
GEORGE H. DANA.
HIRAM S. FALOR.
EDWIN S. CUSHING.
A. J. GOULD.
WILLIAM ARRINGTON,
Foreman.

VIRGINIA CITY, *May 17th*, 1862.

GORDON M. MOTT,
Dist. Judge, 1st District.

22 *Order overruling motion for new trial.*

District court, 1st judicial district,—May term, A. D. 1862.

FRIDAY, (twenty-third day,) *May 30th.*

MARK SHELDON *et als.* }
vs.
SMYTH CLARK *et als.* }

This day appeared, in open court, the plaintiffs, by their attorneys, as also the defendants; and thereupon came on to be heard and de-

termined the motion heretofore made, by the said def'ts, for a new trial herein; and now the court having heard the arguments as well for the pl'ffs as for the defendants, and being fully advised of the law and the premises, doth order that the said motion be, and the same is hereby, overruled; and to the ruling of the court, in refusing said new trial herein, the defendants, by their counsel, excepted.

GORDON N. MOTT,
Dist. Judge, 1*st District.*

23 1st statement on motion for new trial.

1ST JUDICIAL DISTRICT,
Storey County, Territory of Nevada.

MARK SHELDON *et als.*
vs.
SACRAMENTO CO.

The above entitled action came on regularly for trial upon the pleadings of the respective parties, and a jury of twelve having been empanelled and sworn, the following evidence was adduced:

1st Judicial District Court, Storey county, N. T.

MARK SHELDON *et als.*
vs.
SMYTH CLARK *et als.*

Plaintiff's testimony.

Wm. H. Graves sworn:

I am one of the plaintiffs. The Empire Mill Company have crushed rock belonging to defendants. There were forty tons in the first lot; afterwards $237\frac{1900}{2000}$ tons were crushed. The first lot was settled for, although the books were kept open and the defendants continued to bring rock. $30 was agreed to be paid per ton on the $237\frac{1900}{2000}$ tons. The defendants have paid on the last lot $\$3,343\frac{27}{100}$, while cost of crushing last *last* lot $\$7,128\frac{50}{100}$, leaving a balance due of $\$3,795\frac{23}{100}$.

Cross-examination.

The contract for the second lot was made with me; the
24 first contract for 40 tons I know nothing about. There was a contract made expressly with me about October, 1861; this was after the crushing and settlement of the first 40 tons. We crushed the $237\frac{1900}{2000}$ tons. I am not advised as to what the proceeds of this last crushing was; think it was $\$1,769\frac{40}{100}$; my impression is that we crushed 90 or a 100 tons before we made the first return. Capacity of mill 100 tons a week. We took the bullion to Ruhling & Co., and it was run into a bar, amounting to $\$1,769\frac{40}{100}$. We had

a lot of amalgam left from the first 100 tons. We sent the amalgam to San Francisco by the direction of the Sacramento Co., in pursuance of an understanding between Myers and myself. It was sent to our agent, Mr. Griffin, in San Francisco, and by him delivered, in the name of the "Empire Mill Company," to Kellogg, Hewston & Co., who have control of it. Kellogg said that a fire assay would make it yield $700. The amalgam is now held by us as security for the amount due us from the said company. The next lot crushed, making the balance of the 237 tons, was given over to the Sacramento Company, and they worked it in our mill. I do not know what the proceeds were. The amalgam came partly from the battery and partly from the pans. Some of the amalgam was sent to Ruhling's from the pans. That which was amalgamated in the battery was sent to Ruhling's.

Re-examination in chief.

That which was sent to Kellogg, Hewston & Co. is now there; Kellogg refused to work it.

Robert N. Graves sworn:

I am employed as book-keeper in the Empire Mill Co. There was $237\frac{1900}{2000}$ tons crushed after the first 40 tons. There was paid $\$3,343\frac{27}{100}$, leaving $\$3,795\frac{23}{100}$ unpaid.

No cross-examination.

25 *Testimony for defence.*

H. G. Blasdell sworn:

I had a contingent interest in the Empire Mill Co. when the 40 tons was crushed for the Sacramento Company. I was superintendent and manager; Parks was the amalgamator. There was no particular process; we amalgamated in the battery, thence in tubs, thence in pans. I am not an amalgamator; I was trying experiments. There was some salt used in the battery; in working the first 40 tons there was some lime and ashes, and in the tubs sifted in several handsful during the day. The 40 tons yielded at the rate of $\$68\frac{12}{100}$ per ton. We intended to take great care with the rock.

J. W. Farrington sworn:

Acquainted with amalgamating quartz rock. The pl'ffs asked my opinion as to what occasioned the black amalgam. I stated to them that I thought it was overheat, and not properly worked. I see that there was a large amount of base metals in the amalgam. My opinion was asked by them, and I told them as stated before, and I entertain the same opinion now.

J. S. Warren sworn:

Worked at the mill of Empire Co. I continued in after Blasdell left. Mr. Blasdell told me to feed slower, and after he left we fed faster. I was the feeder at the mill. William Bevene, the boss,

told me to put it through; he told me to rush it through. I believe it was the Sacramento rock that I was feeding at the time. It was two weeks after Blasdell left that I was told to put the rock through. I stated to Mr. Bevins that there was too much grease used on the machinery, as it dropped down into the battery. There was
26 more rock put through in the same time under Bevins than under Blasdell—I think two tons a week more.

James B. Ranie sworn:

I know of the delivery of the 40 tons. I was selecting rock at the mine. I helped to select the other rock, which was selected with more care than the first 40 tons, and of equal richness.

J. J. Brown sworn:

Worked in Sacramento ledge. I worked all the time from the commencement of delivery of rock until all was delivered. The rock was as good as the first 40 tons.

John Dinsmore sworn:

Worked in the Sacramento ledge. The last rock sent to the mill was as rich as the first 40 tons. I had no means of judging but the appearance of the rock, and might easily be deceived.

Robert Hunter sworn:

Worked in Sacramento ledge; worked in the mine. The 40 tons first sent to mill was not as rich as the balance. I have often been deceived in the value of rock, and was on this occasion. I think the 40 tons paid better than any other taken from the claim.

M. Thomson sworn:

There was 236 tons delivered to Empire Mill; there was some 20 or 30 tons left at the mill after the return made of the 236 tons. Mr. Graves was very anxious to have us take the black amalgam. The Sacramento Co. refused to receive the amalgam as the proceeds of the rock.

27 *Rebuttal.*

F. A. Park sworn: Amalgamator worked the first 40 tons, and the 236 tons worked in the same manner. I did not use any process; it was purely a mechanical arrangement. I used no process whatever; no process was used in the first 40 tons. I was there; Mr. Myers was at the mill every day. I told him that we could not work the rock satisfactorily; that I could not clean the amalgam, and could not find any one that could, and that they better stop bringing the rock; that I could not work it. He told me to go ahead; that we had worked better than any other mill. He then took some of the amalgam to have it analyzed, and told us to go on with the crushing. I did, and took particular pains with it.

Dr. John A. Veatch sworn: I was present at the mill when the

rock was worked; examined black amalgam; my attention was called to the black amalgam and I assayed some of it, and also some of the rock, and found that the same substance in the rock is also in the amalgam. In the course of my investigation, I found the rock a low grade, rather poor; would assay from 40 to 50 dollars. The rock could not be worked by a mere chemical process. It was a good mill and did good work. The amount of ashes, lime, and salt mentioned, witness Blasdell would have no quantities would do some good; the black amalgam was not produced by any improper manner in working, but was in the rock. I am a chemist and metallurgist by profession, have had practical as well as scientific experience in the
28 working of the ores in this vicinity, and not think that laborers in the mines can form a very good idea of the value of the rock. The only definite way is to work a quantity in a mill. Did not consider the rock very good; worth about $50 per ton.

Cross-examination.

Salt would not prevent black amalgam. Lime and ashes would. It would take lime and ashes in large quantities to prevent it.

William Bevine called: I know Mr. Warner. I was the foreman of the Empire Mill Company both before and after Blasdell left, and the mill was run the same speed, and with the same care both before and after Blasdell left; no difference. I never ordered Mr. Warner to rush it through, but told him to feed slow and careful.

J. W. Hastings sworn: Had a mill in Gold Cañon last fall, at the same time the Empire Mill had. I thought the rock very good, but was deceived; it only paid from 11 to 17 dollars; was troubled with black amalgam; could not work it.

Cross-examination.

My opinion was that the rock was very rich, but we had trouble in saving it.

29 U. S. district court, 1st judicial district, May term, A. D. 1862.

MARK SHELDON *et al.*
vs.
SMYTH CLARK *et al.*

NEVADA TERRITORY, *Storey County, ss:*

Israel W. Knox, being duly sworn, deposes and says, that he is a resident of said county, and is agent and superintendent of the Olive Branch Gold and Silver Mining Company's Mill, located in the Flowery District in said county; that he was subpœnaed as a witness for the defendants in the above-entitled cause; that he was ready and willing to testify on the trial of this cause; having very urgent business to attend to at the mill of said Olive Branch Company in

Flowery District, he remained at home to attend to the same as long as possible, with the understanding and full intention of being present at the trial of this cause, whenever the same should be called on to testify in behalf of the said defendant, in obedience to the summons of this honorable court, requiring the same; that at or about the hour of nine or ten o'clock on Saturday morning, the 17th inst., John Steel, one of the def'ts, came to the residence of this deponent in Flowery District, and required his attendance immediately before this court to testify on behalf of the def't on the trial of this cause, in obedience to the subpœna served upon him, but that this deponent was then confined to his bed by severe illness, which rendered
30 it physically impossible for this deponent to comply with said demand to be present at said trial, and so informed said Steel.

And this deponent further deposes and says, that he then was and still is willing to obey the subpœna served upon him and to testify in this case as therein required, and that sickness alone prevented his doing so at the trial on the 17th instant.

And this deponent further says, that his testimony is very important to the def'ts in this cause, as he is informed by counsel and verily believes; that if he had been present at said trial, he would have testified that he had crushed some ten or eleven tons of the Sacramento company's rock, which was taken from the mill of the plaintiffs to Oliver Branch mill for that purpose, after the said plaintiffs had ceased crushing defendants' rock on account of the accumulation of the black amalgam and consequent loss of gold, and which, as this deponent is informed and believes, was a portion of the rock delivered to said pl'ffs by said defendants for crushing and amalgamation; and that this deponent had no difficulty in working the said rock by reason of the presence or formation of black amalgam during the process of such working; but, on the contrary, the product was good clean amalgam, and the yield from said rock was about the sum of thirty-nine or forty dollars per ton.

And this defendant further states, he would also have testified upon said trial that he used lime and ashes or potash as chemical agents while crushing said rock to prevent the formation of impure or black amalgam, and from this deponent's long experience and his skill and success in working gold and silver ores, and from his scientific
31 knowledge of such matters, he believes that the said chemical agents above mentioned, when properly used, are effectual and necessary in the working of the Sacramento rock, in preventing the formation of black amalgam and other impurities which cause a waste or loss of gold in working ores of that character.

That this deponent informed H. G. Blasdell, then superintendent of the plffs' mill, at or before the time when the first lot of the defendants' rock was crushed at said plffs' mill under the superintendence of said Blasdell, of the effect and value of lime ashes or potash, as chemical agents, used by this deponent to prevent the formation of impure amalgam, and to facilitate the process of amalgamation and thereby increase the product from the rock. And this deponent advised the said Blasdell to make use of the same substances for that

purpose, particularly while working the Sacramento rock, as he was then about to do.

And this deponent is still ready willing to testify to the above facts when called upon.

ISRAEL W. KNOX.

Subscribed and sworn to before me this 20th day of May, 1862.

J. W. NOYES,
Justice of the Peace, Virginia Precinct.

32 U. S. district court, 1st judicial district, May term, A. D. 1862.

MARK SHELDON *et al.*
vs.
SMYTH CLARK *et al.*

NEVADA TERRITORY, *Storey County, ss:*

Monroe Thompson, one of the defendants in this cause, being duly sworn, deposes and says, that he is secretary and one of the trustees of the Sacramento Mining Company, the defendants in the above-entitled cause, and that he is conversant with the facts and testimony constitu— the defence to this action; that he is advised by counsel and verily believes that the said defts. have a good and substantial defence on the merits of this case; that Israel W. Knox, a material and very important witness for the defendants in this action, was prevented from testifying as such witness by reason of sudden and severe illness at the time of the recent trial in this case before this hon. court. This deponent further states, that there was, of his own knowledge, a negotiation going on between the plff's and defendants in this case during the twenty-four hours previous to the hour of opening court on the seventeenth instant, the day of trial in this case, which said negotiation was entered into by the defendants in good faith, and with a sincere desire to settle the subject-matter of the suit without trial. And the said defendants, and this deponent especially, believed that such settlement would be effected before the hour of trial arrived; but they were disappointed at the last moment by
33 the failure of the parties on whom they had relied, and from whom they had assurances of the assistance required to meet the engagements previously made by them, by reason whereof the said defendants were forced to trial immediately, and without due preparation; so that upon the return of the messenger sent to procure the attendance of the said witness Knox, at the trial of the cause commenced on the part of the plff's, that the messenger found the witness confined to his bed by sickness, and unable to attend the trial on that day; but that said witness Knox, notwithstanding the lateness of the hour when the messenger reached him at his residence, would have been present to testify at said trial, had he not been prevented by severe illness, as above stated. This deponent further states that the said defendants were not informed of such illness of said witness until too late to delay the trial on that account, or to procure his deposition to be taken, to be used on the trial to be used *on the trial*, and they were obliged to proceed to trial without the benefi-

of his testimony in their behalf, whereby their interests were greatly prejudiced and injustice done them by the verdict of the jury in favor of the said plaintiffs. And this deponent further says, that he is informed, and believes, and so states the facts to be, that the said def'ts can prove by the testimony of said witness Knox that he has worked ten or eleven tons of the def'ts' rock which was delivered to the said plaintiffs at their mill for crushing, but which was left on hand after the said pl'ffs had ceased crushing for the defendants on account of the accumulation of black amalgam, as proven on said trial; and that the said Knox had no trouble from the production of black amalgam while working the same, but, on the contrary, obtained good
34 amalgam, and realized from the said rock the sum of thirty-nine dollars and upwards per ton; and that they will also prove by said Knox, that he used the same chemical agents as was used by the witness Blasdell in the run of forty tons, as testified to by him; and that the same are in truth, and in fact, important and efficient agents, used by him for the prevention of the formation of black amalgam, and consequent loss of gold; that the said witness Knox informed the said witness Blasdell, previous to the working of the said forty tons of def'ts' rock by him at pl'ffs' mill, of the effect and value of said chemical agents in working the defendants' rock, and advised him, the said Blasdell, to use the same for that purpose. And this deponent further says, that the defendants will prove by said witness that he, the said witness, has had great experience in the working of ores of gold and silver, and possesses much skill and scientific knowledge in such matters, and can work, and is now engaged in working, the rock from the Sacramento ledge, without being troubled with black amalgam; and that, as an expert, he believes that said black amalgam was produced at pl'ffs' mill, after the said Blasdell left the same, by the want of proper care and skill, and by reason of the said pl'ffs' neglect to continue the use of the chemical agents employed by said Blasdell in the first run of forty tons, as testified to by him at said trial.

MONROE THOMSON.

Subscribed and sworn to before me this 20th day of May, A. D. 1862.

J. W. NOYES,
Justice of the Peace, Virginia Precinct.

35 Now comes the said defendants upon the foregoing statement and affidavits thereto attached, and moves the court to set aside and vacate the verdict and judgment heretofore rendered herein, and to grant a new trial of said action, and in support thereof assign the following :

1st. Error of the court in the exercise of its discretion in charging the jury.

2d. Accident and surprise which ordinary prudence could not have guarded against.

3d. Excessive damages, appearing to have been given under the influence of prejudice.

4th. Insufficiency of the evidence to justify the verdict.

PLATT & DAVENPORT,
Att'ys for Defendants.

It is hereby agreed that the foregoing statement, together with the amendments thereto, as filed by pl'ffs, contains the evidence upon said cause, and is the statement on motion for a new trial of said action of said cause.

STEWART, KIRKPATRICK & RISING,
Attorneys for Pl'ffs.

WM. H. DAVENPORT,
Att'y for Def't, Appellant.

Notice of appeal.

1st judicial district, Storey county, Nevada Territory.

MARK SHELDON *et als.*, Empire Mill Co., plaintiffs,
vs.
SMYTH CLARK *et als.*, Sacramento Mining Co., defendants.

Please take notice that the defendants in the above-entitled cause appeal to the supreme court of said Territory from a certain order made in said cause, the 31st day of May, 1862, whereby the said defendants were refused a new trial in said cause, and from the whole judgment rendered in said cause.

Dated June 2d, 1862.

PLATT & DAVENPORT,
Attorneys for Defendants.

To Messrs. STEWART, KIRKPATRICK & RISING,
Attorneys for Plaintiffs.

36 *Appeal bond.*

In the district court, first judicial district, Storey county, Nevada Territory.

MARK SHELDON *et als.*, composing the Empire Mill company, plaintiffs,
vs.
SMYTH CLARK *et als.*, composing the Sacramento Mining Company, defendants.

The above-named defendants having appealed to the supreme court of the Territory of Nevada from a judgment entered in the said district court, on the 17th day of May, A. D. 1862, in favor of the above-named plaintiffs, against the above-named defendants, for the sum of $3,795 and 23-100 dollars, and costs of suit, and from the order of said district court refusing a new trial to said defendants, entered on the 30th day of May, 1862, now, therefore, we, M. L. Winn, hotel keeper; Marco Millenovich, saloon keeper; Thomas Hall and Charles Lintott, butchers; J. W. Noyes, justice of the peace; John Dohle, brewer; and Charles Baker, miner, all residents of Storey county, Nevada Territory, do hereby undertake that the said appellants, the defendants herein, will pay all costs and damages that may be awarded against them on the appeal, not exceeding the sum of eight thousand dollars, ($8,000,) and if the judgment appealed from, or any part thereof, be affirmed, or the said order refusing a new

trial be affirmed, the appellants, the defendants herein, will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellants upon the appeal, including costs, not exceeding the
37 sum of eight thousand dollars, ($8,000.)

Dated June 6th, 1862.

M. L. WINN.
THOMAS H. HALL.
CHARLES BAKER.
his
MARCO + MILLENOVICH.
mark.
OSMER DARST.
CHARLES LINTOTT.
J. W. NOYES.
JOHN DOHLE.
W. H. BEAGAN.

TERRITORY OF NEVADA,
County of Storey, ss:

M. L. Winn, M. Millenovich, Thomas Hall, Charles Lintott, J. W. Noyes, Jno. Dohle, and Charles Baker, being by me first duly sworn, each for himself and not one for the other, deposes and says, that he is a resident freeholder of the county of Storey, in the Territory of Nevada; and the said M. L. Winn says that he is worth the sum of two thousand dollars, ($2,000) over and above all his just debts and liabilities, exclusive of property exempt from execution; and the said Marco Millenovich, Thos. Hall, Charles Lintott, J. W. Noyes, John Dohle, and Charles Baker, each for himself, says that he is worth the sum of one thousand dollars, ($1,000) over and above all his just debts and liabilities, exclusive of property exempt from execution; and the said W. H. Began says that he is worth the sum of $2,500 over and above his debts and liabilities, exclusive of property exempt from execution; and the said O. Darst says that he is worth the sum of $5,500, over and above his just debts and liabilities, exclusive of property exempt from execution.

M. L. WINN.
CHARLES LINTOTT.
THOS. H. HALL.
J. W. NOYES.
CHARLES BAKER.
JOHN DOHLE.
W. H. BEEGAN.
his
MARCO + MILLENOVICH.
mark.
OSMER DARST.

Sworn to before me this 6th day of June, 1862.

DAVID M. HANSON,
Clerk 1st District Court.

The parties to the within bond justified to their respective amounts, before me, this 11th day of June, 1862, and the within bond for $16,000 approved by me.

LEONARD W. FERRIS,
Probate Judge.

Endorsement.

1st judicial district, Storey county, N. T.

MARK SHELDON *et als.* *vs.* SMYTH CLARK *et als.* } Appeal bond.

Filed and approved this 6th day of June, 1862.

D. M. HANSON, *Clerk.*

38 *Certificate of cl'k of dist. court.*

TERRITORY OF NEVADA,
County of Storey, ss:

I, David M. Hanson, clerk of the 1st judicial district court in Nevada Territory, do hereby certify that the foregoing transcript, in the case of Mark Sheldon *et als. vs.* Smyth Clark *et als.*, contains a full, true, and correct copy of the pleadings, writ and return, notices, statement, judgment, affidavits, and bond, in said case, which now remain on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 20th day of June, A. D. 1862.

[L. S.]

DAVID M. HANSON,
Clerk 1st District Court, N. T.,
By CHARLES RAWSON, *Deputy.*

Judgment sup. ct., N. T.

39 Supreme court of Nevada Territory, June term, A. D. 1862.

MARK SHELDON *et als.*, respondents, *vs.* SMYTH CLARK *et als.*, appellants. }

On appeal from the district court, 1st judicial district, Storey county.

And now, on this day, this cause being called, and having been heretofore argued and submitted, and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Turner, C. J., full bench concurring, to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment of the court of the 1st judicial district, in and for Storey county, in the above-entitled cause, be, and the same is hereby, affirmed, with costs.

TURNER, C. J.

Entered 12th of August, A. D. 1862.

40 *Affidavit of amount.*

UNITED STATES OF AMERICA,
Territory of Nevada, ss:

W. F. Myers, being first duly sworn, deposes and says, that he is one of the defendants in the above-entitled cause, and that the amount in controversy is over and above the sum of one thousand dollars, and that the judgment rendered in the supreme court of this Territory, on appeal, is in the sum of three thousand seven hundred dollars, or thereabouts, and costs.

W. F. MYERS, *Pres't.*

Subscribed and sworn to before me this 19th day of August, A. D. 1862.

[L. S.]

DAVID M. HANSON,
Cl'k 1st Dist. Court.

Endorsed: Mark Sheldon *et al. vs.* Smyth Clark *et al.* Affidavit on appeal. Filed Aug. 20th, 1862. J. McC. Reardan, clerk supreme court, N. T.

Writ of error.

TERRITORY OF NEVADA:

SMITH CLARK, CHARLES GIBSON, A. F. MYERS, R. W. MYERS, Samuel Spiro, John Williams, J. B. Beers, F. H. Kirby, W. H. Young, F. W. Steele, W. L. Steele, J. W. Ward, J. W. Hastings, J. S. Bump, Erastus Bond, George Moyle, Daniel Schely, Charles Heart, W. M. Edwards, Jos. Shaw, R. Griffiths, H. C. Millington, S. A. Morrison, Wm. B. Hickok, John McIsaac, Morris Spiro, John Cassidy, George Goard, M. T. Thompson, James Durant, John Kelley, A. Phillipson, J. Lambert, members of and composing the Sacramento Mining Company, pl'ffs in error,

vs.

41 MARK SHELDON, W. H. GRAVES, and O. F. GRIFFIN, deft's in error.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court, holden at Carson City, in and for the Territory of Nevada, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Smith Clark, Charles Gibson, A. F. Meyers, R. W. Myers, Samuel Spiro, John Williams, J. B. Beers, F. H. Kirby, W. H. Young, F. W. Steele, W. L. Steele, J. W. Ward, J. W. Hastings, J. P. Bump, Erastus Bond, George Moyle, Daniel Schely, Charles Heart, W. M. Edwards, Jos. Shaw, R. Griffiths, H. C. Millington, S. A. Morrison, Wm. B.

Hickok, John McIsaac, Morris Spiro, John Cassidy, George Goard, M. T. Thompson, Jas. Durant, John Kelley, A. Phillipson, J. Lambert, plaintiffs in error, and Mark Sheldon, W. H. Graves, and O. F. Griffin, defendants in error, in a civil action to recover the sum of three thousand seven hundred and ninety-five $\frac{23}{100}$ dollars debt, and costs taxed in the court below at one hundred and forty-two dollars, together with costs in the said supreme court of the Territory of Nevada, taxed at thirty-seven ($37 00) dollars, a manifest error has intervened, to the great damage of the said Smyth Clark *et al.*, the said plaintiffs in error, as in their complaint stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded that if judg-
42 ment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the seat of the national government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court, at Washington aforesaid, the fourteenth day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

[L. S.] J. McC. REARDAN,
Clerk Supreme Court, N. T.

Endorsed: "Writ of error."

Petition for citation.

TERRITORY OF NEVADA:

SMITH CLARK, CHARLES GIBSON, A. F. MYERS, SAMUEL SPIRO, R. W. Myers, John Williams, J. B. Beers, F. H. Kirby, W. H. Young, F. W. Steel, W. L. Steel, J. W. Ward, J. W. Hastings, J. S. Bump, Erastus Bond, George Moyle, Daniel Scheley, Charles Heart, M. W. Edwards, Jas. Shaw, R. Griffiths, H. C. Millington, S. A. Morrison, W. B. Hickok, John McIsaac, Morris Spiro, John Cassidy, George Goard,
43 M. T. Thompson, James Durant, John Kelly, A. Phillipson, J. Lambert, members of and composing the Sacramento Mining Company, plaintiffs in error,

vs.

MARK SHELDON, W. H. GRAVES, and O. F. GRIFFIN, defendants in error.

43 *To the Hon. George Turner, chief justice of the supreme court of the Territory of Nevada:*

The petition of Smyth Clark *et al.*, members of and composing the

Sacramento Mining Company, plaintiffs in error in the above-entitled cause, respectfully represent that on, to wit, the 19th day of May, A. D. 1862, at a term of the district court in and for the county of Storey, in the Territory of Nevada, began and holden on the of May, A. D. 1862, a judgment was rendered by said district court against your petitioners, and in favor of the defendants in error, Mark Sheldon, W. H. Graves, and O. F. Griffin, for the recovery by the said defendants in error of and from your petitioners of the sum of three thousand seven hundred and ninety-five $\frac{23}{100}$ dollars, with interest thereon at the rate of ten per cent. per annum, debt, together with the costs of suit of said defendants in error, in that behalf expended, taxed at the sum of one hundred and forty-two dollars; that thereupon your petitioners, plaintiffs in error, moved the court below for a new trial of said cause, which said motion being overruled, plaintiffs in error sued out a writ of error te the term of the supreme court of said Territory of Nevada, began and holden at Carson City on the day of , A. D. 1862, for the reversal of said judgment, and that afterwards, to wit, on the 12th day of August, 44 A. D. 1862, at the said term of said court, the said supreme court gave and rendered judgment in said cause, affirming said judgment of said district court, with costs, taxed at the sum of thirty-seven dollars. Your petitioners further represent that they have sued out a writ of error to the Supreme Court of the United states for the reversal of the judgment of the said supreme court of the said Territory, and that they have taken the steps necessary to remove the record and proceedings in the said cause to the said Supreme Court of the United States, at the term of said court to be begun and holden on the first Monday of December, A. D. 1862.

Wherefore, in consideration of the premises, your petitioners pray your honor—

1st. That a citation be issued by your honor to the said defendants in error, in manner and form provided by law; and—

2d. That your honor approve the bond presented by the plaintiffs in error, as required by the statute in such case made and provided.

As in duty bound, your petitioners will ever pray, &c.

BRYAN & FOSTER,
Of Counsel for Plaintiffs in error.

Endorsed: Petition for citation.

Filed Aug. 20th, 1862.

J. McC. REARDAN,
Clerk Supreme Court, N. T.

45 Supreme Court, December term, A. D. 1862.

UNITED STATES OF AMERICA:

SMITH CLARK, CHARLES GIBSON, A. F. MYERS, SAMUEL SPIRO, R. W. Myers, John Williams, J. B. Beers, F. H. Kirby, W. H. Young, F. W. Steel, W. L. Steel, J. W. Ward, J. W. Hastings, J. S. Bump, Erastus Bond, George Moyle, Daniel Schelev, Charles Hart, W. M. Edwards, Jas. Shaw, R. Griffith, H. C. Millington, S. A. Morrisson, W. B. Spiro, John Cassidy, George Gourd, M. T. Thompson, James Durant, John Kelley, A. Phillipson, J. Lambert, members of and composing the Sacramento Mining Company, plaintiffs in error,

vs.

MARK SHELDON, W. H. GRAVES, and O. F. GRIFFIN, defendants in error.

Assignment of error.

Afterwards, to wit, on first Monday of December, A. D. 1862, at the December term of said Supreme Court, before the chief justice and associate justices of the same, at the city of Washington, in the District of Columbia, came the said Smyth Clark, Charles Gibson, et al., plaintiffs in error aforesaid, by their attorneys, and say that in the record and proceedings in said cause, and also in giving the judgment therein, there is a manifest error in this, to wit:

That it appears from the said record that the said supreme court of said Territory refused to reverse the judgment and the order of the district court in and for the 1st judicial district of said Territory, refused a new trial of the issues in said cause, whereas, by the law of the land, the said supreme court ought to have reversed the said judgment and order of the said district court, and ought

46 to have remanded the said cause back to the said district court for a new trial of the said issues of fact, because—

1st. The verdict of the jury in said district court, and the judgment of the court thereon, were contrary to law.

2d. Said verdict was against evidence.

3d. The court below erred in overruling the demurrer to the replication of defendants in error.

4th. It was made to appear affirmatively to said district court and the jury that the said defendants in error had received and still retained the sum of seven hundred dollars in their possession, for which no accounting was had.

5th. It was made to appear affirmatively to said district court and the jury that the said seven hundred dollars was a just and proper credit and set-off against the claim of defendants in error, and should have been allowed.

6th. It was made to appear affirmatively to the said district court, by the affidavits of Israel W. Knox and Monroe Thompson, in the

statement on motion for new trial, that said Knox was a material and necessary witness on behalf of plaintiffs in error, and that he, said Knox, had he not been prevented by sickness, would have been present and testified in said cause.

7th. There is error in this, to wit: that the said supreme court of said Territory of Nevada refused to reverse the judgment of the said district court, and remand the cause back for further proceedings, because of the refusal of the said district court to grant a new trial to plaintiffs in error on the grounds of accident and surprise,
47 at the time of the trial in the said district court, which ordinary prudence could not have guarded against.

There is error also in this, to wit: Whereas it appears from the said record and proceeding that the judgment of the said district court ought to have been reversed, and a judgment ought, by the law of the land, to have been given for the plaintiffs in error, or the cause remanded the said district court, for other and further proceedings, yet the said judgment was, in fact, by the said supreme court of the said Territory affirmed, and a new trial of the issues in said cause refused. Wherefore, the said Smyth Clark *et al.*, plaintiffs in error aforesaid, pray that judgment of affirmance of the judgment and order of the district court aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings appearing, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment and order of the said district court, and of the said judgment of affirmance of the said supreme court of the Territory of Nevada.

BRYAN & FOSTER,
Of Counsel for Plaintiffs in Error.

Endorsed: Assignment of error.

Filed Aug. 20, 1862.

J. McC. REARDAN,
Clerk Supreme Court.

48 *Bond on appeal to U. S. Sup. C't.*

In Supreme Court.

UNITED STATES OF AMEEICA,
Territory of Nevada:

MARK SHELDON *et al.*, plaintiffs,
vs.
SMYTH CLARK *et al.*, members of and composing the Sacramento Mining Company, defendants.

Know all men by these presents that we, the Sacramento Mining Company, as principal, and W. S. Mineer, (in the sum of two thousand dollars,) M. L. Winn, (in the sum of two thousand dollars,) Cha's

Lintott, S. H. Hall, (in the sum of two thousand five hundred dollars.) Cha's Baker, (in the sum of two thousand dollars,) all of Virginia City, Territory of Nevada, as sureties, are held and firmly bound unto Mark Sheldon, W. H. Graves, and O. F. Giffin, their heirs, executors, and assigns, in the full sum of eight thousand five hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by the presents, signed with our hands and sealed with our seals this 19th day of August, A. D. 1862. The condition of the above obligation is this: that whereas the said Mark Sheldon, W. H. Graves, and O. F. Giffin obtained a judgment on appeal in the supreme court of the Territory of Nevada, on the 12th day of August, A. D. 1862, for the sum of three thousand seven hundred dollars and costs; and whereas the above-bounden Sacramento Mining Company is desirous of appealing on writ of error from the decision of said court to the Supreme Court of the United
49 States: Now, therefore, if the above-bounden Sacramento Mining Company shall well and truly prosecute the appeal or writ of error to effect and well and truly pay or cause to be paid the amount of said judgment and all costs, and obey any order the said Supreme Court of the United States may make therein, if the said appeal or writ of error be withdrawn or dismissed, or pay the amount of any judgment and all costs that may be recovered against the said company in the said Supreme Court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise, to remain in full force and virtue.

W. F. MYERS, *Pres't.*	[SEAL.]
JOHN STEEL, *Treas.*	[SEAL.]
MONROE THOMPSON, *Sec't'y.*	[SEAL.]
JAS. B. RENNIE.	[SEAL.]
W. T. MINEER.	[SEAL.]
M. L. WINN.	[SEAL.]
CHARLES LINTOTT.	[SEAL.]
THOMAS H. HALL, LINTOTT & HALL.	[SEAL.]
CH'S BAKER.	[SEAL.]

In presence of, (interlineations on lines 2 and 17, page 2d, made before signing)—

DAVID M. HANSON.
J. C. FOSTER.

UNITED STATES OF AMERICA.
Territory of Nevada, ss:

W. S. Mineer, M. L. Winn, Thos. H. Hall, Cha's Lintott, and Charles Baker, whose names are subscribed as sureties to the above bond or undertaking, being severally duly sworn, the said sureties W. S. Mineer, M. L. Winn, and Charles Baker, each for himself, and not one for the other, deposes and says, that they are each worth the sum of two thousand dollars; and the said sureties Thos. H. Hall and Cha's Lintott, each for himself, says, on his oath, that they are each

worth the sum of twelve hundred and fifty dollars; all of which
50 said several sums of money for which the said sureties are liable herein, is over and above all just debts and liabilities, and exclusive of property exempt from execution. And each of said sureties, on their oath, say that they are freeholders in said county and Territory, and permanent residents of the same.

W. L. MINNEER.
M. L. WINN.
CHARLES LINTOTT.
T. H. HALL.
CH'S BAKER.

Subscribed and sworn to before me this 19th day of August, A. D. 1862.

[L. S.] DAVID M. HANSON,
Cl'k 1st Dist. Court, N. T.

Endorsed:

JUDICIAL CHAMBERS,
Carson City, Nevada.

I certify that the within bond is fully approved, and that said sureties are fully satisfactory to me, and that the same is hereby accepted. Aug. 19th, A. D. 1862.

GEO. TURNER, *Ch'f Jus., Nevada.*

Mark Sheldon *et al.* vs. Smyth Clark *et al.* Undertaking on appeal. Filed Aug. 20th, 1862. J. McC. Reardan, clerk supreme court.

51 *Citation.*

TERRITORY OF NEVADA:

SMYTH CLARK, CHARLES GIBSON, A. T. MYERS, SAMUEL SPIRO, R. W. Myers, John Williams, J. B. Beers, F. H. Kirby, W. H. Young, F. W. Steele, W. L. Steel, J. W. Ward, J. W. Hastings, J. S. Bump, Erastus Bond, George Moyle, Daniel Scheley, Charles Hart, W. M. Edwards, Jas. Shaw, R. Griffiths, H. C. Millington, S. A. Morrison, W. B. Hickok, John McIsaac, Morris Spiro, John Cassidy, George Goard, M. T. Thompson, James Durant, John Kelley, A. Phillipson, J. Lambert, members of and composing the SACRAMENTO MINING COMPANY, plaintiffs in error,
vs.
MARK SHELDON, W. H. GRAVES, and O. F. GIFFIN, defendants in error.

} Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

To Mark Sheldon, W. H. Graves, and O. F. Giffin, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the

clerk's office of the supreme court of the Territory of Nevada, wherein Smyth Clark, Charles Gibson, *et al.*, members of and composing the Sacramento Mining Company, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the
52 said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. George Turner, chief justice of the supreme court of the Territory of Nevada, this the 20th day of August, in the year of our Lord one thousand eight hundred and sixty-two.

GEO. TURNER,
Ch'f Jus. Sup. C't of Nevada.

Endorsed:

TERRITORY OF NEVADA,
County of Storey.

I hereby certify that I received the annexed citation on the 30th day of August, 1862, at 1 h. p. m., and that on the same 30th day of August, 1862, at Storey county, I duly served the same, pursuant to instructions from pl'ffs' attorneys, upon Mark Sheldon and Wm. M. Stewart, by showing them the original and delivering to each in person a true copy thereof.

Va. City, September 2d, 1862.

WM. H. HOWARD,
Sh'ff Storey Co., N. T.,
By JAMES SECONEY, *Under Sheriff.*

Citation on writ of error. Returned and filed September 3d, 1862. J. McC. Reardan, clerk supreme court.

Filed January 14, 1863.